

MEDICAL CONTESTED CASE HEARING NO. 14069

**DECISION AND ORDER**

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and the Rules of the Texas Department of Insurance, Division of Workers' Compensation. For the reasons discussed herein, the Hearing Officer determines that Claimant is not entitled to an L3-S1 posterior fusion and L3-S1 anterior lumbar interbody fusion with a 3 day length-of-stay for the compensable injury of (Date of Injury).

**STATEMENT OF THE CASE**

On May 27, 2014, Carolyn Cheu Mobley, a Division Hearing Officer, held a contested case hearing to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that the Claimant is not entitled to an L3-S1 posterior fusion and L3-S1 anterior lumbar interbody fusion with a 3-day length of stay for the compensable injury of (Date of Injury)?

**PARTIES PRESENT**

The Claimant/Petitioner appeared and was represented by BM, attorney. The Carrier/Respondent appeared and was represented by MD, attorney.

**EVIDENCE PRESENTED**

Witnesses for Claimant/Petitioner: Claimant.

Witnesses for Carrier/Respondent: None.

The following exhibits were admitted into evidence:

Hearing Officer's Exhibits HO-1 through HO-3.

Evidence for Claimant/Petitioner: Exhibits CL-1 through CL-5.

Evidence for Carrier/Respondent: Exhibits CR-A through CR-E.

**BACKGROUND INFORMATION**

Claimant sustained a compensable injury on (Date of Injury), when he tackled and struggled with a suspect in the course of his duties as a police officer. He received extensive treatment to his

lumbar spine, including medication, facet blocks, physical therapy, and an L4-5 decompressive laminectomy. Claimant's doctor, DF, M.D., recommended an L3-S1 posterior fusion and an L3-S1 anterior lumbar interbody fusion with a 3 day length of stay as treatment for the compensable injury. The procedures were denied by the Carrier and are currently in dispute.

An Independent Review Organization (IRO) assessment was requested. Core 400, LLC was appointed to act as IRO by the Texas Department of Insurance. A neurosurgeon was the reviewer through Core 400. The reviewer upheld the Carrier's denial of the requested surgery because there was an absence of a psychological evaluation and there was no documented evidence of instability or severe spondylolisthesis at any level which would justify the lumbar fusion procedures.

## **DISCUSSION**

Texas Labor Code Section 408.021 provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Health care reasonably required is further defined in Texas Labor Code Section 401.011 (22a) as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence based medicine or, if evidence based medicine is not available, then generally accepted standards of medical practice recognized in the medical community. Health care under the Texas Workers' Compensation system must be consistent with evidence based medicine if that evidence is available. Evidence based medicine is further defined in Texas Labor Code Section 401.011 (18a) to be the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts and treatment and practice guidelines. The Commissioner of the Division of Workers' Compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused, and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Texas Labor Code Section 413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with Texas Labor Code Section 413.017(1).

In accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines by Division Rule 137.100. This rule directs health care providers to provide treatment in accordance with the current edition of the Official Disability Guidelines (ODG), and such treatment is presumed to be health care reasonably required as defined in the Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the ODG. Also, in accordance with Division Rule 133.308(s), "A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division is considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision

has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

On the date of this medical contested case hearing, the ODG provides the following with regard to the requested procedures:

**Patient Selection Criteria for Lumbar Spinal Fusion:**

For chronic low back problems, fusion should not be considered within the first 6 months of symptoms, except for fracture, dislocation or progressive neurologic loss. Indications for spinal fusion may include:

- (1) Neural Arch Defect - Spondylolytic spondylolisthesis, congenital neural arch hypoplasia.
- (2) Segmental Instability (objectively demonstrable) - Excessive motion, as in degenerative spondylolisthesis, surgically induced segmental instability and mechanical intervertebral collapse of the motion segment and advanced degenerative changes after surgical discectomy, with relative angular motion greater than 20 degrees. (Andersson, 2000) (Luers, 2007)]
- (3) Primary Mechanical Back Pain (i.e., pain aggravated by physical activity)/Functional Spinal Unit Failure/Instability, including one or two level segmental failure with progressive degenerative changes, loss of height, disc loading capability. In cases of workers' compensation, patient outcomes related to fusion may have other confounding variables that may affect overall success of the procedure, which should be considered. There is a lack of support for fusion for mechanical low back pain for subjects with failure to participate effectively in active rehab pre-op, total disability over 6 months, active psych diagnosis, and narcotic dependence. Spinal instability criteria includes lumbar inter-segmental movement of more than 4.5 mm. (Andersson, 2000)
- (4) Revision Surgery for failed previous operation(s) if significant functional gains are anticipated. Revision surgery for purposes of pain relief must be approached with extreme caution due to the less than 50% success rate reported in medical literature.
- (5) Infection, Tumor, or Deformity of the lumbosacral spine that cause intractable pain, neurological deficit and/or functional disability.
- (6) After failure of two discectomies on the same disc, fusion may be an option at the time of the third discectomy, which should also meet the ODG criteria.

**Pre-Operative Surgical Indications Recommended:** Pre-operative clinical surgical indications for spinal fusion should include all of the following:

- (1) All pain generators are identified and treated; &
  - (2) All physical medicine and manual therapy interventions are completed; &
  - (3) X-rays demonstrating spinal instability and/or myelogram, CT-myelogram, or discography (see discography criteria) & MRI demonstrating disc pathology correlated with symptoms and exam findings; &
  - (4) Spine pathology limited to two levels; &
  - (5) Psychosocial screen with confounding issues addressed.
  - (6) For any potential fusion surgery, it is recommended that the injured worker refrain from smoking for at least six weeks prior to surgery and during the period of fusion healing.
- (Colorado, 2001) (BlueCross BlueShield, 2002) For average hospital LOS after criteria are met, see Hospital length of stay (LOS).

At the Contested Case Hearing, Claimant did not provide evidence-based medicine in support of his requested L3-S1 posterior fusion and L3-S1 anterior lumbar interbody fusion. He did provide evidence of a psychological evaluation which was provided to the IRO and listed in the reviewed documents. However, there was no evidence of spinal instability or severe spondylolisthesis at any level. Based on the evidence presented, Claimant failed to prove that he meets the requirements in the ODG for the requested procedures and he failed to provide an evidence-based medical opinion sufficient to contradict the determination of the IRO. The preponderance of the evidence is not contrary to the IRO decision that Claimant is not entitled to an L3-S1 posterior fusion and L3-S1 anterior lumbar interbody fusion for the compensable injury of (Date of Injury).

The Hearing Officer considered all of the evidence admitted. The Findings of Fact and Conclusions of Law are based on an assessment of all of the evidence whether or not the evidence is specifically discussed in this Decision and Order.

### **FINDINGS OF FACT**

1. The parties stipulated to the following facts:
  - A. Venue is proper in the (City) Field Office of the Workers' Compensation Division of the Texas Department of Insurance.
  - B. On (Date of Injury), Claimant was the employee of the (Employer).
  - C. On (Date of Injury), Claimant sustained a compensable injury.
  - D. On (Date of Injury), Employer was a self-insured governmental entity for the purpose of workers' compensation.

2. The Carrier delivered to the Claimant a single document stating the true corporate name of the Carrier, and the name and street address of the Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. Core 400, LLC was appointed to act as Independent Review Organization by the Texas Department of Insurance.
4. The IRO determined that the Claimant was not entitled to an L3-S1 posterior fusion and L3-S1 anterior lumbar interbody fusion for the compensable injury of (Date of Injury).
5. Claimant did not provide evidence-based medical evidence in support of his requested procedures.
6. An L3-S1 posterior fusion and L3-S1 anterior lumbar interbody fusion with a 3-day length-of-stay is not health care reasonably required for the compensable injury of (Date of Injury).

### **CONCLUSIONS OF LAW**

1. The Workers' Compensation Division of the Texas Department of Insurance has jurisdiction to hear this case.
2. Venue is proper in the (City) Field Office.
3. The preponderance of the evidence is not contrary to the decision of the Independent Review Organization (IRO) that the Claimant is not entitled to an L3-S1 posterior fusion and L3-S1 anterior lumbar interbody fusion with a 3-day length-of-stay for the compensable injury of (Date of Injury).

### **DECISION**

The preponderance of the evidence is not contrary to the decision of the Independent Review Organization (IRO) that the Claimant is not entitled to an L3-S1 posterior fusion and L3-S1 anterior lumbar interbody fusion for the compensable injury of (Date of Injury).

### **ORDER**

Carrier is not liable for the benefits at issue in this hearing, and it is so ordered. Claimant remains entitled to medical benefits for the compensable injury in accordance with §408.021.

The true corporate name of the insurance carrier is **SELF-INSURED** and the name and address of its registered agent for service of process is:

**LESLIE MILVO  
505 BARTON SPRINGS ROAD  
AUSTIN, TEXAS 78704**

Signed this 29th day of May, 2014.

Carolyn Cheu Mobley  
Hearing Officer